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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 677

WILLIAM FRASER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 468–480) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered October 10, 1944 (R. 467). The petition for a writ of certiorari was filed November 13, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Crim-

inal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the trial court correctly refused to grant petitioner's motion for a directed verdict or to grant his requested instruction that in a perjury case a conviction "must be based upon testimony of two or more witnesses, or if only by one witness, then such witness must be corroborated by other substantial evidence."

2. Whether the trial court correctly instructed the jury that, as a matter of law, petitioner's allegedly perjurious testimony in a prior civil suit was material to the issues in that suit.

STATUTE INVOLVED

Section 125 of the Criminal Code, 18 U. S. C. 231, provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years

STATEMENT

On August 31, 1943, petitioner was indicted in four counts in the District Court for the Western District of Tennessee for perjury predicated upon testimony he had given in December 1942 and in April 1943 in a civil suit (R. 2–16). After a jury trial, he was convicted upon counts 1, 3 and 4 (R. 21–23), and was sentenced on each of these counts to imprisonment for five years and to pay a fine of $2,000, the sentences to imprisonment to run concurrently (R. 31–33). On appeal to the Circuit Court of Appeals for the Sixth Circuit his convictions on counts 1 and 4 were reversed, but his conviction on count 3 was affirmed (R. 467–480). This count (R. 10–13) charged that on April 22, 1943, petitioner, as a witness in a civil suit pending in the District Court for the Western District of Tennessee, falsely testified, in response to questions seeking to ascertain the disposition made by him of the proceeds of property involved in that litigation, that he had not paid anything on a mortgage on his home since 1940 or 1941; that this testimony was as to a material matter in the litigation and that petitioner did not believe it to be true.[1]

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[1] The testimony of petitioner upon which count 3 was based, as set out in the indictment, was as follows (R. 11–12):

Q. Mr. Fraser, did you pay off the balance of the indebtedness on your home in 1942?

A. I will answer you this way——

Q. Just answer my question.

A. Did we pay it off in 1942?

The evidence adduced in support of count 3 may be summarized as follows:

On November 17, 1942, P. M. Barton and others filed a bill of complaint in the District Court for the Western District of Tennessee against petitioner, G. H. Britton and W. J. Britton, individually and doing business as G. H. Britton Cotton Company, alleging that the defendants in April 1942 had contracted to sell for the plaintiffs some 1,859 bales of cotton which had been pledged by the plaintiffs to the Mid South Cotton Growers Association to secure a loan in the sum of $62,871.59; that the defendants took possession of the cotton and sold it in May and June 1942; that the cotton had a market value of approximately $130,000; that the lien had been discharged by the defendants, leaving a balance to be accounted for by them of ap-

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Q. Did you pay off the balance of the indebtedness on your home in 1942?

A. I don't know. I made a trade, and I think these people reduced the indebtedness to around $2,500.00 or $2,600.00 That was made in 1940 or 1941.

Q. Are you sure it wasn't made in 1942?

A. No; 1940 or 1941.

Q. Whom did you make that trade with?

A. Brigance. He was sick, and they didn't have any money.

Q. Where is he?

A. He is dead.

Q. Who have you been paying the money to?

A. Mrs. Brigance.

Q. You haven't paid anything since 1940 or 1941?

A. I haven't; no.

proximately $67,128.41, of which $57,928.50 should have been held in escrow by the defendants, as agreed in the contract, for the payment of a government tax against the cotton; that the tax had not been paid nor had the amount thereof been placed in escrow; and that the sum of approximately $9,200, the balance in excess of the tax, had not been paid to the plaintiffs. The plaintiffs demanded an accounting (R. 338–344). An amended complaint alleged that petitioner was fraudulently concealing the proceeds of the cotton in a safe deposit box in a certain bank and that he was insolvent; a temporary injunction was sought to prohibit the removal of the contents of the box (R. 345–347). Thereafter, the United States intervened, making all parties defendants, and set up its claim for a penalty of approximately $58,000 due under Title III of the Agricultural Adjustment Act of 1938, as amended (7 U. S. C. 1348), because of the growing of the cotton in excess of allotted acreages. The Government alleged that petitioner had received and was concealing the proceeds of the cotton in the safe deposit box, and a judgment was sought against all parties for the amount of the penalty; the Government also sought an injunction against petitioner and his agents and the bank from disposing of any funds in the box. (R. 348–358.) Subsequently, as the result of a pre-trial examination of petitioner (R. 378), orders were entered

directing that $28,875 found in his control and alleged to be a portion of the proceeds of the sale of the cotton in question, should be deposited in court pending disposition of the litigation (R. 379–380, 436). Petitioner then filed an answer to the Government's intervention, challenging the constitutionality of the Agricultural Adjustment Act and alleging that, in any event, he was not liable for the penalty because the persons from whom he had purchased the cotton had assumed payment thereof (R. 383–390). Petitioner also filed an answer to the original complaint, as amended, denying that the plaintiffs had any interest in the cotton, that he had agreed to put the proceeds of the cotton in escrow, or that he was liable for the tax. He alleged that the plaintiffs had sold the cotton to him and his co-defendants at prices ranging from $6 to $9 per bale above the lien existing against the cotton, and that he had offered this amount to the plaintiffs, but that they had refused to accept it. (R. 390–398.) G. H. Britton, petitioner's associate in the transaction and also a defendant in the action, filed an answer alleging that G. H. Britton Cotton Company had purchased the cotton outright at $7 per bale above the existing loan, but that it had not agreed to pay the tax; that 1,859 bales of Barton cotton had been received and sold for $120,861.69, of which $62,871.59 had been paid to discharge the lien; that

of the excess, there was due Barton the sum of $53,920.28, and that the balance of $4,069.82, representing the profit, belonged to the Britton Company (R. 399–407).

After a trial before the court without a jury, the court found (R. 426–437) that Barton had sold to petitioner and G. H. Britton as partners, 1,853 bales of cotton under an agreement whereby Barton was to receive $7 per bale after payment by the purchasers of the lien in the amount of $64,140.18 and the tax in the amount of $55,762.14, and the purchasers were to receive any excess; that petitioner and Britton had sold the cotton for $123,111.95 and had paid off the lien; that petitioner had attempted to dispose of and conceal the balance of $58,971.77; that $33,461 of the proceeds of the sale had been recovered from petitioner and Britton and had been deposited in court, but that $17,701.33, which petitioner had received in September and October 1942 from one Allan W. Leftwich, and which was "directly or indirectly" part of the proceeds, had been appropriated and concealed by petitioner, "along with other amounts received from the sale of the cotton" (R. 437). The court entered judgment in favor of the United States against petitioner and Britton, and Barton and his associates, in the amount of $55,762.14, and credited them with the amount of the money deposited, leaving an unpaid balance of $22,301.14 (R. 441–449). On an ap-

peal taken by petitioner and Barton and others to the Circuit Court of Appeals for the Sixth Circuit, the judgment was affirmed on October 3, 1944, in an opinion not yet reported.[2]

At petitioner's trial in the instant case, it was stipulated that he had testified at the civil trial on April 22, 1943, in response to questions of the plaintiffs' counsel, as alleged in count 3 of the indictment, that he had not paid anything on a mortgage on his home since 1940 or 1941 (R. 48; see fn. 1, pp. 3–4, *supra*). It was also stipulated that on September 28, 1942, a mortgage on petitioner's home had been released by the recording of a release executed by one C. A. Tindall, the holder of the mortgage (R. 49). The assistant cashier of the National Bank of Commerce of Memphis testified for the Government that on September 28, 1942, his bank had issued a cashier's check payable to the First National Bank of Memphis for $3,175.55, which had been purchased on the same day by petitioner's check in that amount (R. 93–94). The auditor of the First National Bank (R. 101) testified that on September 28, 1942, Tindall (the mortgage holder) had purchased a cashier's check in the amount of $3,175.55, for which he had tendered the check of the National Bank of Commerce in the same amount, and that on Tindall's deposit slip for

[2] We have lodged a copy of this opinion with the Clerk of the Court.

October 1, 1942, there appeared next to the item $3,175.55, the name "Fraser" (R. 101–103).

At the close of the Government's case (R. 212), petitioner moved for a directed verdict, which was overruled (R. 213–218). Petitioner took the stand in his own defense and testified, in explanation of his testimony at the civil trial that he had not paid anything on the mortgage since 1940 or 1941, that he had been thinking of an earlier mortgage which he had paid off in April 1941 and had not recalled the fact that he had paid off the mortgage in 1942 (R. 242–243). On cross-examination, petitioner admitted that he did give a check to Tindall in satisfaction of the mortgage, but said that "At the time I gave the check, I had no knowledge of it" (R. 261). The interrogation then continued as follows (R. 261):

> Q. Had what?
>
> A. No knowledge.
>
> Q. You mean you were unconscious?
>
> A. I don't know whether I was or not, but I went to the hospital two days afterward, bleeding badly, and I don't recall that check, but it is a fact that I did pay off the mortgage on my home at that time.
>
> Q. And you paid it out of the money you received in the transactions about which you testified?
>
> A. That's right.
>
> Q. That is, you paid it out of the money you received in your transactions with Barton, that is, either directly with the

Barton money, or money that came from the sale of the Leftwich cotton?

A. It wasn't Barton money; proceeds of the Leftwich transaction.

Evidence was offered by petitioner that he had been suffering from a prostate condition since 1940, on account of which he had been hospitalized in August and October 1942, and that this condition had affected his memory (R. 326–334). At the close of the evidence, petitioner renewed his motion for a directed verdict, and the motion was again denied (R. 337). The trial judge instructed the jury that it should acquit petitioner if it believed his contention that his testimony was not wilfully false, that he thought it was true at the time he gave it, and that there was no intention on his part to mislead or to misstate the facts; or, if it found that the Government had not proved the case beyond a reasonable doubt (R. 451). The trial judge also instructed the jury that petitioner's testimony in the civil suit, as a matter of law, was material to the issues in that suit (R. 452), to which petitioner duly excepted (R. 456–457). The judge refused to grant petitioner's special request No. 1 to the effect that it was a question for the jury whether his testimony was wilfully or intentionally false (R. 458–459), stating that this matter had already been covered by the charge (R. 457). The judge also refused to give petitioner's special request No. 2 that "You are instructed that you cannot

convict the defendant on the uncorroborated statement of any one witness. A conviction of perjury must be based upon testimony of two or more witnesses, or if only by one witness, then such witness must be corroborated by other substantial evidence" (R. 459), because he did not "think any such rule prevails today" (R. 458).

ARGUMENT

1. Petitioner contends (Pet. 17–21) that the circuit court of appeals erred in holding that the evidence in support of count 3 of the indictment was sufficient as against his motion for a directed verdict and to excuse the refusal of the trial judge to grant his special request No. 2, *supra,* relating to the quantum of proof in perjury cases. Petitioner does not direct his principal attack upon the sufficiency of the evidence to establish the falsity of the testimony, in respect of which the circuit court of appeals, after summarizing the evidence as consisting of "the stipulation that the mortgage had in fact been paid, Fraser's [petitioner's] admission that he did pay it off and corroborative testimony of the two bankers with supporting documents, tending to show that a checking transaction between Fraser and the lien holder for the amount of the mortgage had cleared through the banks on the day stated" (R. 480), said, "We think the evidence as to this count, consisting as it did of Fraser's admission or confession and the cor-

roborative testimony of the bankers, was such that it was unaffected by the failure of the court to give special request No. 2 [*Pawley* v. *United States*, 47 F. (2d) 1024 (C. C. A. 9)] * * *" (R. 480). Petitioner insists, however (Pet. 17–21), that the two-witness rule [3] requires that the elements in the offense of perjury of wilfulness and corrupt intent (cf. *United States* v. *Norris*, 300 U. S. 564, 574; *United States* v. *Smith*, Fed. Cas. No. 16,336 (D. Mass.); 2 Wharton's Criminal Law (12th Ed.), sec. 1512) must be established in accordance with the rule, and claims that the evidence relied upon to establish the falsity of his testimony did not prove that he knew or remembered having signed a check in 1942 for the purpose of paying off the mortgage or that he intended to mislead or to deceive.[4]

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[3] This rule, as stated in the opinion below (R. 477), quoting from *Goins* v. *United States*, 99 F. (2d) 147, 148 (C. C. A. 4), certiorari granted, 306 U. S. 623, certiorari dismissed, 306 U. S. 622, is "that the uncorroborated oath of one witness is not enough to establish the falsity of the oath as to which perjury is charged, and that, except where the falsity of such oath is indisputably established, as by documentary evidence, it must be shown by the testimony of at least two witnesses, or by the testimony of a witness corroborated by circumstances proved by independent testimony."

[4] Petitioner also indicates that the testimony in the civil suit upon which count 3 was based was not that he did not pay off the mortgage in 1942, but that he was uncertain as to whether he had done so (Pet. 12–13, 20). We do not think that the testimony, when read in its entirety (see fn. 1, pp. 3–4, *supra*), is susceptible of petitioner's construction, and that

In this posture of the case, it is manifest that the question presented is clearly not the same as the one now before the Court in *United States* v. *Weiler,* 143 F. (2d) 204 (C. C. A. 3), certiorari granted, October 9, 1944, No. 340. In that case, where petitioner did not admit the falsity of his testimony, but claimed that it was true, the question is whether the failure of the trial court to instruct the jury concerning the two-witness rule was prejudicial. But where, as in this case, the defendant admits his testimony to be false, it is settled that the rule does not apply. *Pawley* v. *United States,* 47 F. (2d) 1024 (C. C. A. 9); *Buckner* v. *United States,* 118 F. (2d) 468, 469 (C. C. A. 2); 7 Wigmore on Evidence (4th Ed.), p. 282.

Assuming that the evidence which showed that petitioner's testimony was false, did not establish, as petitioner claims, that it was given knowingly or with a corrupt motive, we submit that it is not necessary to establish those matters in accord-

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evidently was the view of the courts below (cf. R. 451, 476). However, even if the testimony were susceptible of the construction suggested by petitioner, it is well settled that, in such circumstances, the rule requiring a direct witness is not applicable, and that perjury may be proved by evidence sufficient to convince a jury beyond a reasonable doubt. *People* v. *Doody,* 172 N. Y. 165 (1902); *Berhle* v. *United States,* 100 F. (2d) 714 (App. D. C.); *United States* v. *Otto,* 54 F. (2d) 277 (C. C. A. 2); see also *Mallard* v. *State,* 19 Ga. App. 99 (1916); *State* v. *Wilhelm,* 114 Kan. 349 (1923); *R.* v. *Natanson,* 3 D. L. R. 308 (1927).

ance with the requirements of the two-witness rule. Both the text-writers and the courts have stated that the rule applies only to proof of the fact alleged as falsely sworn. 7 Wigmore, op. cit., p. 280; Best on Evidence (5th Ed.), sec. 604; Underhill, *Criminal Evidence* (4th Ed.), p. 1357; *Atkinson* v. *State,* 133 Ark. 341, 347 (1918); *State* v. *Raymond,* 20 Ia. 582, 587 (1866); *People* v. *Hayes,* 70 Hun (N. Y.) 111, 116–117 (1893), affirmed, 140 N. Y. 484 (1894); *Brake* v. *Commonwealth,* 218 Ky. 747, 749 (1927). In the *Pawley* case, *supra,* the defendant, as in this case, had admitted the falsity of his testimony, and had advanced as his sole defense that he did not understand the nature of the inquiry or the import of the question. Under these circumstances, the court held that the two-witness rule "had no application, and the refusal of the court to state an inapplicable abstract proposition of law would not constitute error" (47 F. (2d) at 1026). To the same effect is *O'Leary* v. *United States,* 158 Fed. 796, 799 (C. C. A. 1), in which it was said the rule does not apply to a case where the issue is "one of intent or forgetfulness * * * and not in any sense as to anything to which corroborative proofs would relate." See also *State* v. *Courtright,* 66 Ohio St. 35, 41 (1902); *State* v. *Vane,* 105 Wash. 170, 177 (1919). While it has been stated that "the allegation that the testimony of one charged with perjury was false and that the

appellant did not believe it to be true when he gave it under oath must be established by two witnesses or by one with circumstances of corroboration" (*Fotie* v. *United States,* 137 F. (2d) 831, 840 (C. C. A. 8); see also *Boehm* v. *United States,* 123 F. (2d) 791, 809–810 (C. C. A. 8), certiorari denied, 315 U. S. 800; *United States* v. *Hall,* 44 Fed. 864, 870 (S. D. Ga.)), we believe that it is apparent from an examination of the cases cited that the real question presented was the application of the rule to the falsity of the testimony, and that the language in respect of the belief of the defendant was intended to mean merely that the evidence which would establish falsity ordinarily would also tend to establish that the defendant did not believe his testimony to be true. Cf. *Vermont* v. *Chamberlin,* 30 Vt. 559, 571 (1858), where it was held that proof of the falsity of the oath makes a *prima facie* case of corrupt swearing. Whether the false testimony has been given wilfully and with a corrupt motive are matters normally capable of proof only by circumstances from which the requisite mental state can be reasonably and rationally inferred, unless they are admitted by the accused. *State* v. *Dryden,* 26 Del. 466, 468 (1912); *R.* v. *Knill,* 5 B. & Ald. 929, 930 note. As the court below held with respect to the element of wilfulness (R. 476–477), there was substantial evidence to require the submission of the case to the jury

under appropriate instructions, which, in fact, were given, p. 10, *supra*. It is conceded that petitioner did pay off the mortgage by issuing a check. Certainly, where a man gives a check for a substantial amount to pay off a mortgage on his home in September 1942, and some six months later testifies to the contrary in a suit in which he claims that he is not concealing money received by him in September 1942, a sufficient basis exists for a jury to find that he testified falsely with deliberation and with a corrupt intent. These matters having been decided by a jury and left undisturbed by two courts, there is no occasion for further review by this Court. *United States* v. *Johnson,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 590.

2. Petitioner also contends (Pet. 21–25) that the testimony which is the basis of count 3 of the indictment was not material to any proper or legitimate issue in the civil suit. He urges that the circuit court of appeals was in error in holding (R. 474) that "the main issue was, whether the sales agreement between Barton and his associates and the Fraser-Britton associates was a contract for the sale of the cotton by the defendants as Barton's agents, or whether it was an outright sale to them. * * *" Petitioner argues (1) that there was no issue as to the nature of the contract, but that it was expressly conceded

that the sale was "outright" (Pet. 22); and (2) that the testimony itself shows that the inquiry concerned petitioner's disposition of money which he had received from cotton that was not the subject of the litigation. We submit that the contentions are without merit.

The issue in the civil suit was to be determined, as the court below properly held (R. 474), by "the pleadings in the civil action" and not by the testimony of petitioner in his perjury trial, which he cites (Pet. 22), that the sale was "outright." Clearly, the pleadings in the suit (see pp. 4–6, *supra*), raised an issue as to whether the cotton had been sold to petitioner subject to the government penalty, as alleged by the plaintiffs, or as not subject to the penalty as claimed by petitioner. There is obviously no support for petitioner's argument, other than his own view of the matter, that no such issue existed.

There is, likewise, no basis for petitioner's claim that the money concerning which he was being interrogated was received from the sale of cotton not germane to the cotton involved in the civil suit. In this connection, he points to a statement in the opinion of the circuit court of appeals with reference to count 4 of the indictment that "Appellant insists 'it wasn't Barton cotton'; and the statement, although misleading, was literally true and the Government's evidence does not place the transaction in a dif-

ferent light''[5] (R. 478). Petitioner asserts (Pet. 21–22) that the foregoing excerpt from the opinion establishes that the court accepted his contention in this respect. As shown by the opinion (R. 478), the court was speaking of count 4 of the indictment (R. 13–16), which alleged that at a pre-trial examination in the civil case, petitioner falsely testified as to the amount of money he had obtained from the sale of the cotton. This count charged that petitioner's testimony that he had received only $30,000 from the sale of Barton cotton (obviously after the loan of $64,000 had been satisfied, see p. 7, *supra*), was false because he had received, in fact, the additional sum of $17,000. The circuit court of appeals pointed out (R. 478) that while petitioner admitted that he had received the additional sum, he insisted that the receipt thereof was an independent transaction (See R. 243–244, 261), and that this was literally true, but misleading. Therefore, it concluded (R. 479) that "since appellant insisted that his statement upon which count 4 was based was correct, * * * appellant was entitled to a directed verdict upon count 4 because the Government failed to introduce two witnesses or one witness and corroborative circumstances in support of count 4." But

[5] This excerpt from the opinion as quoted in the petition (Pet. 21), substitutes the word "money" for the word "cotton."

the court did not hold, as contended by petitioner, that the $17,000 in question had not been involved in the civil suit. Actually, as found by the district court in that case (R. 437), the sum of $17,000, which petitioner urges was in no way concerned in the case, was part of the proceeds received by petitioner through the sale of the Barton cotton. It was not Barton cotton, but it was Barton money.

CONCLUSION

The case was correctly decided by the court below. It does not involve the question now before the Court in *Weiler* v. *United States,* No. 340. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
ROBERT S. ERDAHL,
LEON ULMAN,
Attorneys.

DECEMBER 1944.

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